BLANK

PAGE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo, Ohio 43604

EDWARD J. HICKEY, JR.
620 Tower Building
Washington, D.C. 20005

RICHARD R. LYMAN
741 National Bank Building
Toledo, Ohio 43604

Attorneys for Railway Labor Executives' Association As Amicus Curiae

Of Counsel:

MULHOLLAND, HICKEY & LYMAN
741 National Bank Building
Toledo, Ohio 43604

Dated at Toledo, Ohio, this 22nd day of September, 1966.

The West Toledo Publishing Co., Inc.

BLANK

PAGE

INDEX

CASES CITED

CASES CITED (CONTINUED)

STATUTES

MISCELLANEOUS

BLANK

PAGE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the position of petitioner urging reversal of the decision of the Court of Appeals below. The consent of all parties to the case has been obtained and such consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Railway Labor Executives' Association, on whose behalf this brief as *amicus curiae* is presented, is a voluntary unincorporated association, comprised of the chief executives of the following standard national and international railway labor organizations:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Railroad Signalmen
Brotherhood of Maintenance of Way Employes
Brotherhood Railway Carmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Railroad Trainmen
Brotherhood of Sleeping Car Porters, Hotel & Restaurant Employees and Bartenders International Union
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railway Employes' Department, AFL-CIO
Railroad Yardmasters of America
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
Transportation-Communication Employees Union

The principal office of said association is located at 400 First Street, N.W., Washington, D.C.

The foregoing organizations affiliated with the Railway Labor Executives' Association represent, for purposes of collective bargaining under the Railway Labor Act, the bulk of the nation's rail employees, and this Court has recognized the Association as the proper party to appear and speak for these affiliated organizations and their railroad employee members. *Interstate Commerce Commission v. Railway Labor Executives' Association,* 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States,* 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al., v. United States,* 355 U.S. 141 (1957).

Each of these organizations is a party to collective bargaining agreements with nearly every railroad in the United States, governing the rates of pay, rules and working conditions of the craft or class of employees which it represents. Said organizations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application. It is their further function to provide for the selection and compensation of the labor members of the National Railroad Adjustment Board, the administrative tribunal created by the Act for final determination of such disputes in the event they cannot be settled on the property of the carrier or carriers involved; to process such disputes to the Board on behalf of the employees they represent; and to seek enforcement of the awards and orders of the Board in the event of a failure or refusal of the carrier or carriers to comply therewith.

Under the decision of the court below, an organization seeking to enforce a claim that its agreement had been violated, by assignment of work falling within the scope of that agreement to employees in another craft, must face the

prospect of having its agreement re-written, or modified, to reconcile its provisions with possible conflicting provisions in the agreement pertaining to the other craft. By the same token, organizations other than the claimant, unaware of the existence of any dispute between themselves and the carrier, would be forced before the Board and the courts to do battle for the retention of provisions in their agreements which had been achieved through voluntary collective bargaining, but which might conflict with the asserted coverage of the claimant organization's agreement. And the function of the Adjustment Board would be expanded from that of interpretation and application of agreements so as to encompass the reconciling and rewriting of conflicting agreements.

The extent to which the organizations comprising the *amicus curiae* Railway Labor Executives' Association can continue to fulfill their foregoing statutory duties and functions, and the procedures to which they must resort to do so, are directly and vitally involved in the issues in this case. Also dependent upon the determination of those issues are the future effectiveness, and the proper function and purpose, of the Adjustment Board, responsibility for the creation, operation and financial support of which is shared by these organizations. The issues in this case are thus of great concern to the *amicus curiae,* and their proper resolution by this Court is a matter of the highest importance not merely to the petitioner organization but to railroad labor as a whole.

SUMMARY OF ARGUMENT

Summarily stated, the propositions which will be supported in this brief are as follows:

I. Under the Railway Labor Act the National Railroad Adjustment Board's jurisdiction is limited to disposing of disputes growing out of grievances or out of the interpretation or application of collective bargaining agreements — the so-called "minor disputes". The Board may not rewrite agreements, pass upon their validity, or determine the rights of the parties to contract with respect to particular subject matter, such matters being either non-justiciable or determinable by other tribunals or procedures under the Act.

II. The court below erred in invalidating the award sought to be enforced because of the Board's failure to resolve a so-called jurisdictional dispute between employees in two separate crafts. For the Board to have done so would have required it either to assume the power of reconciling or re-writing potentially conflicting agreements, thus substituting compulsory arbitration for the major disputes handling procedures of Section 6 of the Railway Labor Act; or to invade the province of the National Mediation Board by adjudicating the right of the crafts involved to contract for particular work, and the proper scope of each craft or class of employees. The decision below would also require the Board to ignore clear statutory conditions imposed upon the exercise of its jurisdiction, such as prerequisite handling of disputes in negotiations on the property of the carrier, and limitations upon the jurisdiction of the four Divisions of the Board.

III. The decision below fails to recognize the distinction between disputes over proper interpretation and application of existing agreement provisions relating to work jurisdiction, and other jurisdictional disputes with respect to the negotiation of, or the right to negotiate, such provisions. Other methods and procedures are prescribed by the Railway Labor Act for settlement of the latter type of dispute, and both the legislative history of the Act and previous decisions of this Court demonstrate that such disputes do not lie within the jurisdiction of the National Railroad Adjustment Board. The Board as constituted could not function effectively or as an impartial, or at least equally divided bi-partisan, tribunal in the area of such disputes.

ARGUMENT

I. JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD IS LIMITED TO DISPUTES GROWING OUT OF GRIEVANCES OR OUT OF THE INTERPRETATION OR APPLICATION OF AGREEMENTS.

With the prime objective of attempting to avoid interruptions to commerce resulting from labor disputes in the railroad industry Congress, in enacting the Railway Labor Act, has provided a comprehensive set of regulations for the handling of a number of different kinds of disputes that might arise. The Congressional objectives, as well as a general description of these different disputes, are stated in Section 2, General Purposes (U.S.C., Sec. 151a, General Purposes), as follows:

> "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of em-

ployment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

The foregoing provision was first incorporated in the statute with the adoption of the 1934 amendments (Public, No. 442, 73rd Cong., H.R. 9861, appr. June 21, 1934, 48 Stat. 1185), which also created the National Railroad Adjustment Board. Of the various categories of problems and disputes for which it was thus the express purpose of the statute to provide, it is clear that only the fifth one enumerated was to be committed to final and binding adjudication by the Adjustment Board, whose jurisdiction is set forth in almost identical language in Section 3, First (i), of the Act (45 U.S.C., Sec. 153 (p)).

That the proposed Adjustment Board's function would be limited to the realm of contract interpretation, and would in no way affect the bargaining process itself, was repeatedly brought out in hearings before the Congressional committees considering the 1934 Railway Labor Act. The principal witness before these committees, Federal Coordinator of Transportation Joseph B. Eastman, stated the matter before the House Committee on Interstate and Foreign Commerce (73rd Congress, 2nd Session; hearings on H.R. 7650) as follows:

"The whole matter of working rules and conditions is not within the jurisdiction of this adjustment board. They have no right to determine what the working rules shall be. It is only the interpretation of whatever rules are agreed upon. It is a question of interpreting them. It is minor matters of that kind, and not the questions either of wages or of working rules. The basic matters are left for the process of mediation." (At p. 64; to same effect, see previous testimony of Mr. Eastman at p. 47.)

Mr. Eastman testified in like vein before the Senate Committee on Interstate Commerce (73rd Congress, 2nd Session; hearings on S. 3266, pp. 17, 155, 158), as did Mr. George M. Harrison, President of the Clerks' Brotherhood (p. 33-34).

This view of the limited function of the Board has been confirmed by the decisions of this and other courts. Thus, in *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U.S. 711, the Court, in speaking of the various classes of controversy dealt with by the Act, said (p. 723) that the class referable to the Adjustment Board ". . . contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . ."

Similarly, in *Steele v. Louisville & N. R. Co.,* 323 U.S. 192, 205, the Court recognized the Board's limitation to questions of contract interpretation, and its inability to deal with disputes over the validity of particular agreements. Also holding the Board to be limited to the interpretation of agreements as it found them was the decision in

Southern Pac. Co. v. Joint Council Dining Car Employees, 165 F. (2d) 26 (C.A. 9).

To the same effect, in a case involving the validity of an agreement with one craft covering work previously performed by another group of employees, this Court has expressly stated that the dispute could not be resolved by the Adjustment Board, saying:

> ". . . no adequate remedy can be afforded by the National Railroad Adjustment or Mediation Board, The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in *Slocum v. Delaware, L. & W. R. Co.,* 339 U.S. 239, 94 L. Ed. 795, 70 S. Ct. 577. *This dispute involved the validity of the contract, not its meaning. . . .*" *(Brotherhood of R. T. v. Howard,* 343 U.S. 768, 774; emphasis supplied.*)*

II. THE COURT BELOW ERRED IN INVALIDATING THE BOARD'S AWARD FOR FAILURE TO UNDERTAKE DETERMINATION OF MATTERS BEYOND THE BOARD'S JURISDICTION.

It is clear that the decision of the court below is based upon the premise that when one craft processes a claim to the Adjustment Board asserting that its agreement has been violated by assignment of certain work to employees in another craft, the Board is required to bring the second craft before it in the same proceeding and decide the "jurisdictional dispute" by awarding the work to one craft or the other. The court in no way limits the function of the Board to that of interpreting existing agreements, but would require it simply to resolve the dispute by an award determining *which* craft was entitled to the work. Of course, in the event of an overlapping in coverage of the respec-

tive crafts' agreements, resolution of the dispute would necessarily require the Board either to re-write one or both agreements, or to rule on their validity in terms of which craft had the *right* to contract with respect to the subject matter.

This certainly is the contention of respondent, as urged at pages 21-25 of its brief in opposition to certiorari, where it is urged that the Board must determine the validity of agreements in terms of deciding which craft "had the right to contract for any particular work" (Brief in Opposition, p. 24), and that "only one of the two competing unions could have the lawful right to claim a given work assignment, and that the Board's function was to resolve the entire dispute" (Brief in Opposition, p. 21).

It is of course well established that the Board's awards have the final and binding effect of arbitration awards, and that the Board procedure constitutes compulsory arbitration. *Gunther v. San Diego & Arizona Eastern Railway Co.* 382 U.S. 257. But, as we have pointed out, this compulsory arbitration procedure is applicable only to the category of minor disputes committed to the Board's jurisdiction. It is equally well established that major disputes, relating to the making of new agreements rather than interpretation and application of existing ones, are not subject to adjudicatory processes, but are left in the realm of voluntary collective bargaining subject only to exhaustion of the "cooling off" provisions of the statute. *Elgin, Joliet and Eastern R. Co. v. Burley,* 325 U.S. 711, 724-725; *General Committee, B.L.E. v. Missouri-K.-T. R. Co.,* 320 U.S. 323, 332-333; *Railroad Telegraphers v. Chicago and North Western Railroad Co.,* 362 U.S. 330.

Clearly, then, for the Board to "reconcile" agreements by in effect re-writing overlapping provisions with respect to work jurisdiction, as contemplated by the court below, would be to exceed its jurisdiction, and to substitute compulsory arbitration for the voluntary agreement-making procedures of the Act.

By the same token, a determination by the Board as to the validity of agreement provisions, in terms of the right to contract for particular work and the proper scope of a craft or class, would clearly transcend the area of contract interpretation committed to the Board's jurisdiction, and would constitute an invasion of the exclusive jurisdiction of the National Mediation Board under Section 2, Ninth of the Act (45 U.S.C. Sec. 152, Ninth). *Switchmen's Union of N.A. v. Nat. Mediation Bd.*, 320 U.S., 297; *General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323; *Division No. 14, Order of Railroad Tel. v. Leighty*, 298 F. (2d) 17, cert. den. 369 U.S. 885.

In addition to requiring the Board to exceed its subject matter jurisdiction, the decision of the court below would have required it to violate clear statutory conditions imposed with respect to the exercise of its jurisdiction.

Thus, while the Board's right to entertain a claim is predicated upon its prior handling on the property of the carrier "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" (45 U.S.C. Sec. 153 First (i)), the decision of the court below would force the second craft before the Board for compulsory arbitration of a dispute as to its rights which not only had not been handled on the property, but which it did not know existed. Such a result would not only

contravene the plain requirement of the quoted provision of Section 3 First (i), but would prevent any effort at compliance with the duty imposed by Section 2 First of the Act "to exert every reasonable effort . . . to settle all disputes, whether arising out of the application of such agreements or otherwise. . . ." (45 U.S.C. Sec. 152 First.)

In addition, under the statute (45 U.S.C., Sec. 153 First (h)), the Adjustment Board consists of four divisions, each of which has jurisdiction only over disputes involving specified crafts and classes of employees,[1] and "whose proceedings shall be independent of one another." This allocation of jurisdiction and functions is clearly calculated to enhance the advantages, frequently noted by this Court, of having these minor disputes referred to and decided by panels of experts peculiarly familiar with the problems and grievances which have customarily arisen with respect to the craft whose claim is being passed upon.

In a number of instances[2] a craft which is the petitioner before one division of the Board has charged a carrier with violating its agreement by assignment of work to members of another craft whose grievances and contract claims lie within the jurisdiction of a different Division of the Board. Under the principles adopted by the court below, the second craft would be forced to submit to a final and binding

---

[1]Contrary to the implication contained in respondent's brief in opposition, p. 27-28, it is the craft of employees involved in a dispute, and not the content or job classification of work which they are claiming under their agreement, which determines the division of the Board having jurisdiction to entertain the claim.

[2]In spite of respondent's assertion (brief in opposition, p. 27) that "This presents no real problem and would seldom occur", the problem is real, has often occurred, and has given rise to complicated litigation. E.g., see *Seaboard Air Line Railroad Company v. Castle*, 170 F. Supp. 327, and *Union Railroad Co. v. National Railroad Adjust. Bd.*, 170 F. Supp. 281.

declaration of its rights by a division having no jurisdiction to entertain its claims, on which it is unrepresented*, and whose members lack familiarity with the problems, customs and practices pertaining to the aspects of railroad operations performed by the employees which it represents. Jurisdictional objections aside, such a holding goes far to defeat the Congressional objective of having these disputes resolved by experts in their field.

III. THE DECISION BELOW IS CONTRARY TO THE CONGRESSIONAL SCHEME FOR HANDLING LABOR DISPUTES IN THE RAILROAD INDUSTRY, AND THREATENS CONTINUED EFFECTIVENESS OF THE ADJUSTMENT BOARD PROCEDURE.

The comprehensive scheme adopted by Congress for the handling of labor disputes in the railroad industry, with certain categories of disputes being placed under the jurisdiction of highly specialized tribunals and others being removed from adjudicatory processes and committed to voluntary collective bargaining, is seriously jeopardized by the decision below, as is the continued effectiveness of the National Railroad Adjustment Board, the tribunal to which Congress committed, for final and binding decision, the whole area of minor disputes in the industry.

The impact of the decision below upon the Congressional scheme can be stated quite simply. Subject only to certain procedural steps calculated to induce agreement and avoid interruptions to commerce, Congress left the negoti-

---

*The composition of the Board as provided for in Sec. 3 of the Act has resulted in almost all of the employee craft organizations having an officer of the organization sitting as a labor member of the division having jurisdiction over that craft.

ation of labor contracts to be accomplished through voluntary collective bargaining. It gave the National Mediation Board exclusive and generally non-reviewable authority to determine the representative having the right to negotiate, and the identity of the employees, or the scope of the craft or class, to be represented. And it gave the National Railroad Adjustment Board exclusive and generally non-reviewable authority to interpret and apply the agreements thus negotiated.

The decision below, as we have indicated, would require the Adjustment Board to go beyond its statutory authority, and invade both the jurisdiction of the Mediation Board, and the area of non-justiciable disputes left to voluntary bargaining, thus breaking down the lines so carefully drawn by Congress. Insofar as it might determine the dispute which gave rise to this litigation by holding that only one craft organization could have the legal right to negotiate for the work in question, as urged by respondent, and then deciding which of the two had that right, it would clearly be assuming the functions and authority of the National Mediation Board. If, on the other hand, it undertook to reconcile conflicting agreements of the two crafts, it would be invading the area of non-justiciable disputes, and interfering with the operation of free collective bargaining.

We believe that such a ruling is clearly inconsistent with the legislative history of the Act, and in conflict with previous rulings of this court. In *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, involving a dispute remarkably similar to this one with the exception that the Board had not given notice to the Clerks of the pendency of the Telegraphers' claim, the Court said, "Were notice given to Clerks they could be indifferent to it; they would be within their legal

rights to refuse to participate in the present proceeding." (349 U.S., p. 372.) And despite respondent's effort to distinguish it (brief in opposition, p. 23) on the ground that the holding of non-justiciability of a dispute such as this occurred in a case in which a *court* had been asked to decide which union had the right to contract for particular work, the rationale of this Court's decision in *General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323, is clearly inconsistent with any concept of Adjustment Board jurisdiction. Indeed, contrary to respondent's assertion (brief in opposition, footnote 38, p. 23), the Adjustment Board *was* mentioned (320 U.S., p. 331), along with the statutory procedure for enforcement of its awards, in the course of the Court's discussion of adjudicatory processes that *had* been provided by Congress, and by way of preface to and in contrast with the concept of non-justiciability which the Court held applicable to the dispute involved.

We have already adverted to legislative history demonstrating the Congressional intent to limit the function of the Adjustment Board to that of contract interpretation, as opposed to the making of agreements. This insulation of the Board from involvement with the making of agreements eliminated a situation which had plagued its predecessor, the United States Railroad Labor Board. (Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency", 46 Yale Law Journal 567, 572.)

Finally, the effectiveness and impartiality of the Board as an adjudicatory tribunal would be largely impaired by the principles adopted by the court below.

A craft, whether the one making a claim or the one forced before the Board to oppose the claimant craft, would

be placed in the position of having its agreement reconciled with another agreement to which it was a complete stranger, and in the negotiation of which it was legally banned from participating. *Virginian Railway v. System Federation No. 40,* 300 U.S. 515.

But perhaps the most drastic effect would be to give the carrier members of any division of the Board the complete balance of power to decide any work jurisdiction dispute before it. As we have noted, most crafts are represented in the group of labor members sitting on the division having jurisdiction over their claims. Where, as here, both crafts are under the same division, it is apparent that if that division were compelled to decide that one craft had the right to the work in question and that the other did not, the representatives of the two crafts would most certainly vote against each other. The carrier members, uninhibited by any craft affiliations and voting as a body, would simply award the work to whichever craft the particular railroad involved wished to give it to, being assured of the support of at least one labor member to break the deadlock and obviate appointment of a neutral referee.

A railroad could with equal efficacy control the outcome of a dispute between crafts falling under different divisions of the Board, by the simple expedient of submitting the dispute itself instead of waiting for either labor organization to do so, and selecting the division having jurisdiction over and including a representative of the craft which it wished to have the work.

The inequity of this inevitable result of the ruling below is apparent, and it could only lead to a complete breakdown of the Board.

CONCLUSION

The manner in which the court below has resolved these issues represents a drastic threat to the continued effectiveness of the National Railroad Adjustment Board as an instrumentality for the fair and expeditious settlement of disputes over the interpretation of railroad collective bargaining agreements. Its decision is based upon an erroneous conception of the proper scope of the Board's jurisdiction, is contrary to express statutory provisions, legislative history, and decisions of this Court, and should be reversed.

Respectfully submitted,

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo, Ohio 43604

EDWARD J. HICKEY, JR.
620 Tower Building
Washington, D.C. 20005

Of Counsel:

RICHARD R. LYMAN
741 National Bank Building
Toledo, Ohio 43604

MULHOLLAND, HICKEY & LYMAN
741 National Bank Building
Toledo, Ohio 43604

Attorneys for Railway Labor Executives' Association As Amicus Curiae

Dated at Toledo, Ohio, this
22nd day of September, 1966.

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Labor Executives' Association, as *amicus curiae*, do hereby certify that on the 22nd day of September, 1966, I served a copy of the brief of Railway Labor Executives' Association as *amicus curiae* upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Milton P. Kramer, Lester P. Schoene and Martin W. Fingerhut, 1625 K Street, N.W., Washington, D.C. 20006, Attorneys for petitioner, Transportation-Communication Employees Union; F. J. Melia, Harry Lustgarten, Jr. and James A. Wilcox, 1416 Dodge Street, Omaha, Nebraska 68102, Attorneys for respondent, Union Pacific Railroad Company.

.....

Richard R. Lyman

BLANK

PAGE